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Supreme Court of the United States

OCTOBER TERM, 1931

No. 287

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, *et al.*,

Appellants,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, *et al.*,

Appellees.

REPLY BRIEF FOR APPELLANTS

WALTER MCFARLAND,
ELMER A. SMITH,
P. F. GAULT,
DOUGLAS F. SMITH,
H. H. LARIMORE,
J. N. DAVIS,
A. B. MASON,
R. J. HAGMAN,
M. L. COUNTRYMAN, JR.,
R. S. OUTLAW,
LESLIE CRAVEN,
A. B. ENOCH,
D. P. CONNELL,
DICK DIXON,
FRANK A. LETTINGWELL,
Attorneys for Appellants.

FREDERICK H. WOOD,
WILLIAM D. WHITNEY,
G. HOWLAND CHASE,
Of Counsel.

December 2, 1931.

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Appellees.

REPLY BRIEF FOR APPELLANTS

Four answering briefs have been filed. Each emphasizes the fact that the Commission, in addition to reducing rates, revised relationships and corrected practices. But all improper practices and discriminations could have been removed without reducing rates or diminishing revenues. By directing attention to these features of the report the appellees seek to distract the attention of the Court from the main issue, viz., did the Commission in reducing the rates proceed upon a misconception of its powers and duties?

In meeting this issue all of the briefs rely chiefly, if not entirely, upon the ultimate conclusion, contained in the report, that the rates were unreasonable to the extent that they exceeded those prescribed and upon the statement, which the report contains, that the findings made are

under the provisions of the Interstate Commerce Act. Neither is conclusive upon the Court (Opening Brief, pp. 146 to 148). The answer made is that the Commission could not have proceeded upon a misconception of its powers and duties under the Interstate Commerce Act because it said it proceeded thereunder, and if so, it must have proceeded upon a proper interpretation thereof. This, of course, is no answer at all.

All of the briefs suggest that the appellants rely chiefly upon the concurring opinions, particularly that of Commissioner Eastman. This is not so. Appellants rely chiefly upon the conclusions to be drawn from the main report itself, supplemented and enforced by the concurring opinions. Commissioner Eastman's concurring opinion is emphasized because it contains what is believed to be an express statement of the conception of power and duty necessarily implicit in the main report. Moreover, as we shall point out in this reply brief, the other concurring opinions disclose that all of their authors, constituting more than a majority of the Commission, were likewise proceeding upon that conception of the Commission's powers and duties which we have endeavored to show appears from the main report as well as from the concurring opinion of Commissioner Eastman.

All of the briefs assert that the appellant's whole case rests upon the contention that the Commission proceeded upon a misconception of the effect of the resolution upon its powers and duties. This is not so. We believe it did. We believe that it was because of this that the Commission failed to give proper effect to the requirements of Sec. 15a. But, as pointed out in our opening brief, and as will be further pointed out in this reply

brief, whether such be the explanation of the Commission's action or not, it appears from the main report itself that the Commission did not properly construe or give proper effect to such section and to its relation to the case before it.

1. The Commission consciously and deliberately reduced the revenues of the carriers in a substantial amount. The fact that it also removed discriminations and corrected improper practices constitutes no justification of the rate reductions required.

(a) THE COMMISSION CONSCIOUSLY AND DELIBERATELY REDUCED THE REVENUES OF THE CARRIERS.

None of the appellees deny that the general level of the rates was reduced by 13%, as stated in the bill (R. 18) and in the appellants' brief. This statement is not capable of denial because it is predicated upon a mathematical calculation based upon the relation of the new rates and the old as contained in the appendix to the order (R. 244, *et seq.*).

None deny that the net result was substantially to reduce the revenues of the carriers. The report states that while the full effect of the order cannot be determined, because of limitations on the use of transit, etc., the "revenue effects will be substantial" because the reductions far outnumber the increases.* This can mean

*The entire quotation follows:

"While the reductions far exceed the increases, and the corresponding revenue effects will be substantial, the full effect upon revenues can not be adequately foretold, in view of the limitations upon transit, the elimination of

nothing else but that the net result, after taking into account all of the matters stressed by the appellees in their briefs, is to reduce substantially the net revenues of the carriers.

This statement was preceded by the statement that the Commission had made many checks and estimates. As pointed out in our opening brief, a concurring Commissioner estimated the resulting revenue losses at at least $15,000,000 per annum (R. 187). Presumably, his estimate was based upon the checks and estimates referred to in the main report, which must have taken into account, if sufficient to base any conclusion thereon, the effect of the new transit rules, etc. The affidavits presented by the carriers show that the loss in revenue would be approximately $20,000,000 per annum and would not be offset to any material degree by the new transit rule (R. 634, 637). No counter-affidavits were filed.

(b) THE COMMISSION'S ACTION IN REGARD TO TRANSIT CANNOT BE USED TO SUPPORT THE REDUCTION MADE IN THE GENERAL LEVEL OF THE RATES.

Considerable space is given in appellees' briefs to a discussion of transit and of the effect thereon of the Commission's order. The Commission itself had no illusions that its decision on the subject of transit (or on the

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transit balances outbound from primary markets, and the greater safeguarding of revenues from wasteful competition that should follow the reduced level of rates" (R. 148).

It will be apparent that the fact that the *full* effect upon the revenues could not be adequately foretold, affects only the quantitative measurement of the reduction, the *fact* of a substantial net loss being conceded.

twin subjects of "the elimination of transit balances outbound from primary markets" and "the greater safeguarding of revenues from wasteful competition that should follow the reduced level of rates") altered the fundamental fact that "the reductions in rates far exceed the increases" and that "the *corresponding* revenue effects will be substantial" (R. 148).

Appellees' briefs refer to an estimate in a concurring opinion that the cost to the railroads of transit service is approximately $30,000,000 per year. To avoid misunderstanding, we should point out that this is not by any means the estimated saving from the Commission's decision as to transit. The Commission did not eliminate transit, but in fact ordered that two transit services, plus one inspection stop, should be granted by the carriers on each haul. There is nothing to indicate that the cases in which more than two transit services are rendered, or where excessive back or out-of-lines hauls are permitted, are other than exceptional. The report does not find that they are. Moreover, it has been the practice on the Northern lines to charge for transit; these lines are forbidden by the Order to continue that charge and are ordered to grant the same free transit as the other lines (R. 105). The carriers are still required to perform transit, and to pay for it out of the reduced rates. As pointed out by Commissioner Eastman (R. 158) these services are not furnished free but the cost thereof is included in the rate to which the transit privileges apply. In fact, the inadequacy of the set off to the carriers' revenues provided by the transit provisions of the order is best evidenced by the fact that five Commissioners actually favored a charge for transit (Commissioners

McManamy, R. 149; Eastman, R. 159; Lewis, R. 182-183; Porter, R. 193; and see Commissioner Woodlock, R. 186). Free transit was therefore carried in the Commission by a single vote; and obviously the ground upon which five Commissioners voted against it was that they thought that this might be a means to restore to the carriers a part of the revenues which all the Commission recognized that they were taking from the carriers by their order.

Moreover, as we have pointed out, the affidavits submitted by the carriers in support of the estimated revenue losses expressly stated that the estimates made would not be appreciably affected by the new transit and other rules upon which the appellees lay such stress. The sworn bill estimated revenue losses at approximately $20,000,000 (R. 18). This allegation was supported by affidavits made by the Manager of the Statistical Bureau of the Western lines, who applied the order of the Commission to the entire territory (R. 633, 635-6), and by the accounting or traffic officers of five representative carriers, operating in different parts of the territory, but together covering it all, to wit, Atchison, Topeka & Santa Fe Railway Company (R. 649), Chicago, Rock Island & Pacific Railway Company (R. 644), Missouri Pacific Railway Company (R. 652), Northern Pacific Railway Company (R. 642), and Union Pacific Railway Company (R. 638).

The affidavit made by the Statistician of the Northern Pacific showed that the loss to that carrier would amount to at least $531,000 per annum (R. 643) The Northern Pacific does not now accord transit but is required so to do by the Commission. The Northern Pacific is one of those carriers that operate in the Northwestern territory, where

some of the appellees stress the fact that certain advances were made. It is also one of those two lines in respect of which the Commission in its main report comments upon the fact that although the Northern Pacific and its parallel line, the Great Northern, had together added $216,144,016 to their investment during the period 1916-1926, their combined net railway operating income in 1926 was $3,394,410 less than in 1916 before this additional investment was made (R. 78). Such is the effect upon one carrier of an order which it is said to have preserved revenue by advancing some rates and by prescribing new transit rules.

It appears from the other affidavits that the revenue loss in the district as a whole is $21,980,023 per annum, or 11.29% (R. 637); that the estimated loss to the Santa Fe is $2,523,890 per annum or 13.24% (R. 651), to the Rock Island, $1,612,744 per annum or approximately 10% (R. 647), to the Missouri Pacific $2,142,380 per annum or 21.72% (R. 653) and to the Union Pacific System $2,009,091 per annum or 11.53% (R. 641-642). In each of these affidavits, save that of the Rock Island, it is said that the maker has taken into consideration the effect of the limitations upon transit, the use of transit balances, the prevention of wasteful competition, etc., and that the same will not be such as to materially change the estimated losses stated (R. 637, 642, 651, 654). The affidavit made by the Auditor of the Rock Island did not contain such a statement but did contain the statement that it was based upon a study of the rates, *rules and regulations*, contained in the order (R. 645). All of these lines operate in part in so-called Western trunk line or Mid-Western territory, where some of the appellees

stress the fact that the coarse grain rates were increased. These affidavits take into account such increases, as well as decreases in other rates. Together they are representative of all parts of the District, midwest, southwest, northwest and Pacific coast.

As previously stated, no counter-affidavits were submitted. As appears from the report, the Commission made certain checks and estimates of the revenue effects of the order (R. 148). Presumably, these checks and estimates took into account the effect of the new transit rules and the elimination of the use of transit balances, provided the record in the case was such as to permit it. If they did, then the Commission was in a position to controvert the appellants' affidavits in respect of the effect of these rules, etc., upon the net revenue losses resulting from the order, if erroneous. If the checks and estimates, referred to in the report, did not take the same into account, or if the record before the Commission was such that the effect thereof could not be determined, then the Commission had no right to base its order upon the assumption that the required changes in rules governing the use of transit and of transit balances would afford any substantial offset to the reductions in rates. There is nothing in the report which indicates that the Commission at the time it was made had any such opinion. But if it did, and such opinion was supported by anything tangible, the Commission had an opportunity to file counter-affidavits. Instead of doing so it asks the Court to assume such substantial offset. Nor could this question of fact have been developed by the introduction by the appellants of the record before the Commission. This record did not contain the checks and estimates

referred to in the report order and could not have contained them, since they were checks and estimates based upon the application of the order itself.

(c) THE MANNER IN WHICH THE COMMISSION REVISED THE RELATIONSHIP OF RATES AND REMOVED DISCRIMINATIONS SHOWS THAT IT CONSCIOUSLY AND DELIBERATELY REDUCED THE GENERAL LEVEL OF THE RATES AND THE REVENUES OF THE CARRIERS.

The Commission found that the rates in many parts of the territory were not properly related to each other. For the purpose of determining such relationship it employed as its yardstick the mileage scale of rates prescribed by it as reasonable maximum rates in *Oklahoma Millers League* v. *A. & M. R. R. Co.*, 128 I. C. C. 523, applying between Oklahoma and Louisiana.

This is the Southwestern scale referred to in our opening brief and which had been prescribed during the pendency of the proceedings* as a scale of maximum rea-

*The Commission challenges our use of the so-called *Louisiana* scale (*Oklahoma-Millers League* v. *A. & M. R. R. Co.*, 128 I. C. C. 523, Docket 15026) as a basis of comparison with the rates herein prescribed for application in the Southwest saying that if we had used the so-called *Oklahoma* scale (*Oklahoma Corporation Commission* v. *A. & S. Ry. Co.*, 101 I. C. C. 116), the reduction would not have appeared so great. However, in using this scale as a basis of comparison, we were merely following the Commission's example. (See R. 107-109.) The Commission in its report made the following statement (R. 107, note):

> "It [the 15026 scale] was regarded in view of the method of fixing distances as the substantial equivalent of the scale prescribed in *Oklahoma Corporation Commission* v. *A. & S. Ry. Co.*, 101 I. C. C. 116 (Docket 12244) for application from Oklahoma to Texas."

sonable rates (Opening Brief, pp. 64-65). The Commission in its report uses this as "a convenient yardstick" for measuring the relation of rates throughout the western district as a whole and sets out the result of such comparisons in a table (R. 108-109) in which the rates in various parts of the territory are expressed in percentages of such scale. Having thus measured the relationship of the rates by this yardstick of its own choosing and recent prescription, the Commission in its order proceeds to materially reduce the yardstick itself and along with such reduction to reduce correspondingly the rates which it had measured thereby. The average of the rates prescribed is 20% below what it would have been had the rates been brought to the level of the "yardstick" scale. In every single case the rates prescribed by the Commission are materially lower than would the rates have been had the Commission equated them to the yardstick. This is shown by the table reproduced on the opposite page.

There could be no clearer demonstration that in readjusting the relation of rates, in order to provide a more symmetrical and harmonious rate structure, the Commission consciously and deliberately reduced the general

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It appears from a comparison of the two scales that there is a difference in the manner in which they are applied, which apparently must be taken into account in determining their effect. The Commission in using the language quoted above was, of course aware of this, and declared that considering the difference in the method of fixing distances the one was the substantial equivalent of the other. In our brief we accepted the Commission's conclusion in this respect, which counsel for the Commission now repudiates.

COMPARISON OF PRESCRIBED RATES WITH RATES WHICH WOULD HAVE BEEN PRESCRIBED IF THE COMMISSION HAD APPLIED ITS YARDSTICK SCALE.

	[1]Page of Record	[2]Ratio Present Rate to 15026 Scale	[3]Present Rate	[4]Present Rate Equated to 15026 Scale	Prescribed Rate
To Chicago from—					
Iowa	252	70.6	19.9	28.1	20.0
Wisconsin	271	67	16.8	25.1	16.7
Oklahoma	263	84	38.9	46.3	35.1
Montana	259	90	52.8	58.6	49.6
Nebraska	260	86.5	33.9	39.2	28.9
Minnesota	256	68.5	23.3	34	24.2
Kansas	254	83	33.2	40	30.7
North Dakota	262	75.5	32.4	42.8	33.9
Eastern South Dakota	267	83	30.4	35.4	28.6
Colorado	247	95	46.3	48.7	42
To Milwaukee from—					
Wisconsin	271	69	13.8	20	14.1
To St. Louis from—					
Oklahoma	264	89	34.1	38.3	29.2
Southeastern Missouri (to St. Louis and Memphis)	258	85	14.0	16.4	14.0
Iowa	253	71	21.3	30	21.1
To Minneapolis from—					
Montana	259	82	41.0	50	38.7
Iowa	253	74	17.9	24.1	17.0
Minnesota	256	63	11.8	18.7	13.2
North Dakota	262	66	20.4	30.9	21.9
Eastern South Dakota	267	75	20.1	26.8	19.2
To Duluth from—					
Montana	259	82	41.0	50.0	38.7
Minnesota	256	70	15.8	22.5	17.3
North Dakota	262	66	20.4	30.9	21.9
To Kansas City from—					
Idaho	249	94	65.7	69.8	59.3
Oklahoma	263	88.5	27.8	31.4	20.2
Panhandle of Texas	268	93	33.6	36.1	27.8
Western Missouri	257	73	12.5	17.1	11.5
Nebraska	261	78	20.9	26.5	18.4
Iowa	253	73.7	18.7	25.3	17.3
Kansas	254	68.5	16.7	24.2	15.8
Colorado	247	87	29.6	34.0	27.7
To Omaha from—					
Idaho	249	94	65.7	69.8	59.3
Nebraska	260	86	17.5	20.3	13.9
Iowa	253	74	13.6	18.3	13
Colorado	247	87	29.6	34.0	27.7
To Sioux City from—					
Eastern South Dakota	268	90	16.4	18.1	14.8
To Memphis from—					
Oklahoma	265	83	31.8	38.3	28.8
Panhandle of Texas	269	89.5	39.6	47.7	38.1
To Galveston from—					
Idaho	249	111	82.5	74.3	69.3
Oklahoma	264	91	32.6	35.8	28.5
Panhandle of Texas	268	82	32.0	39.0	30.9
Kansas	255	110	47.0	42.7	38.4
Colorado	249	115	57.2	49.5	48.1
To New Orleans from—					
Idaho	252	108	85.5	79.1	74.3
Oklahoma	265	100	39.2	39.2	32.5
Panhandle of Texas	269	92.5	41.6	44.8	39.0
Kansas	255	78	48.5	62.1	43.4
Colorado	248	110	60.1	54.6	53.1
To Alexandria from—					
Nebraska to (Arkansas, Louisiana, Oklahoma, Texas)	261	115	54.8	47.9	44
To Seattle from—					
Idaho:					
Southern	252	100	46.3	46.3	37.3
Northern	249	70	26.2	34.8	21.6

[1]Page of Record (Appendix D to Report) on which the corresponding "Present R made by the Supplemental Order of April 10, 1931, have been taken into consider haul has necessarily been omitted.

[2]As shown on R. 108.

[3]By "Present Rates" is meant the rates in effect at the time of the order herein.

[4]This is the rate that would have been fixed if the Commission had readjusted th

EXAMPLE

The first rate shown (from Iowa to Chicago) is used as an example. The present coarse grains from Iowa to Chicago shown in the table R. 252. Said average rate is of the rate that would apply if fixed at the level of the Commission's yardstick scale. yardstick scale, would be 28.1 cents, as shown in the next to the last column of the abov (R. 252).

	[1]Page of Record	[2]Ratio Present Rate to 15026 Scale	[3]Present Rate	[4]Present Rate Equated to 15026 Scale	Prescribed Rate
To Omaha from—					
Idaho	249	94	65.7	69.8	59.3
Nebraska	260	86	17.5	20.3	13.9
Iowa	253	74	13.6	18.3	13
Colorado	247	87	29.6	34.0	27.7
To Sioux City from—					
Eastern South Dakota	268	90	16.4	18.1	14.8
To Memphis from—					
Oklahoma	265	83	31.8	38.3	28.8
Panhandle of Texas	269	89.5	39.6	47.7	38.1
To Galveston from—					
Idaho	249	111	82.5	74.3	69.3
Oklahoma	264	91	32.6	35.8	28.5
Panhandle of Texas	268	82	32.0	39.0	30.9
Kansas	255	110	47.0	42.7	38.4
Colorado	249	115	57.2	49.5	48.1
To New Orleans from—					
Idaho	252	108	85.5	79.1	74.3
Oklahoma	265	100	39.2	39.2	32.5
Panhandle of Texas	269	92.5	41.6	44.8	39.0
Kansas	255	78	48.5	62.1	43.4
Colorado	248	110	60.1	54.6	53.1
To Alexandria from—					
Nebraska to (Arkansas, Louisiana, Oklahoma, Texas)	261	115	54.8	47.9	44
To Seattle from—					
Idaho:					
Southern	252	100	46.3	46.3	37.3
Northern	249	70	26.2	34.8	21.6
Montana	260	84	39.2	46.6	37.8
South of Snake River in Columbia Basin	266	75	20.8	27.7	19.2
North of Snake River in Columbia Basin	249	80	24.9	30.1	21.3
To Oregon-Washington from—					
Colorado	248	98	56	56.1	53
To Portland from—					
Idaho	250	100	43.3	43.3	33.5
Washington, northeastern Oregon, northern Idaho	250	81.7	24.8	30.3	21.3
Oregon Maine-Line points on O. W. R. & N.	266	81.5	20.7	25.4	14
Oregon branch-line points on O. W. R. & N., intrastate	266	94.5	23.1	24.5	17.9
Oregon branch-line points on O. W. R. & N., interstate	266	108	26.6	24.6	18.8
To Arizona from—					
Idaho	251	109.5	67.8	61.9	61.7
Colorado	248	124.5	61.5	49.4	46.3
To New Mexico from—					
Colorado	247	149	57.7	38.7	35.5
To California from—					
Idaho	250	106.5	57	53.5	46
Colorado	248	98	57.7	58.9	51.7
To El Paso from—					
Colorado	247	125	57.7	46.1	35.7

[1]Page of Record (Appendix D to Report) on which the corresponding "Present Rates" and "Prescribed Rates" are given. (Changes in Prescribed Rates made by the Supplemental Order of April 10, 1931, have been taken into consideration. Where the corresponding rates are not shown, the particular haul has necessarily been omitted.

[2]As shown on R. 108.

[3]By "Present Rates" is meant the rates in effect at the time of the order herein.

[4]This is the rate that would have been fixed if the Commission had readjusted the rates to conform to the level of the yardstick scale.

EXAMPLE

The first rate shown (from Iowa to Chicago) is used as an example. The present rate shown in the above table is the average of the rates on wheat and coarse grains from Iowa to Chicago shown in the table R. 252. Said average rate is 19.9 cents. The present rate is shown at p. 658 of the Report to be 70.6% of the rate that would apply if fixed at the level of the Commission's yardstick scale. Accordingly, the 19.9 cent present average rate, if raised to 100% of the yardstick scale, would be 28.1 cents, as shown in the next to the last column of the above table. The average rate actually prescribed by the Commission is 20 cents (R. 252).

level unnecessarily. The briefs of the appellees comment on the fact that the report says:

> "We are confronted with the fact that, judged by the usual standards of transportation conditions, some of the rates in the western district, on both wheat and coarse grains, are too low, while others are too high. Horizontal treatment of such rates would perpetuate these inconsistencies. It follows that proper treatment would leave some of the rates as they are, reduce some, and increase others" (R. 109).

This conclusion follows immediately after the table referred to and is based thereon. Notwithstanding this statement, only eight of the present rates are increased while fifty-six are reduced, in many instances far below the reductions which would result from the use of the yardstick itself as a measure. The reductions average 5.3 cents. The advances, on the other hand, in the eight rates advanced, range from .1c to 1.5c, averaging 1.1c. If instead of doing this it had applied its own yardstick, prescribed as a scale of reasonable maximum rates under the standard of the Interstate Commerce Act during the pendency of this proceeding, it would have preserved the carrier revenues and at the same time established the symmetrical and harmonious rate structure which it was seeking.

In our opening brief we pointed out that when the Commission came to deal with cases of individual discriminations it almost uniformly corrected the same by a reduction in the higher of the offending rates and fre-

quently by reductions in both. That it did so is virtually conceded in the briefs of the appellees.*

The very method employed by the Commission in revising rate relations and removing discriminations, therefore, shows that it consciously and deliberately established a lower general level of rates, into which such revised relationships were fitted, instead of maintaining the existing level and thus preserving the revenues of the carriers.

2. The fact that the report states that the findings are under the Interstate Commerce Act is not, as urged by all the appellees, conclusive that they were based upon a proper conception of the Commission's powers and duties thereunder.

The Commission recognized that the necessary effect of its order was substantially to reduce the revenues of the carriers, despite the inadequacy of their existing return. Clearly, all of the discriminations which the order removes and all of the improper practices which the order corrects could have been accomplished without the prediction of any such result. To review at length, as the briefs of the appellees do, the comprehensive nature of the proceeding, extent of the record, the maladjust-

*For example, the Commission (Br. 62) concedes that prejudice was remedied, as to one group of rates, by materially reducing all rates to Cairo, but states that the Commission's remedying of that situation was not one-sided because many rates from Southeastern Missouri to St. Louis and Memphis were increased. However, the rates to Cairo (which is an important rate-fixing point) were reduced on an average by 3.3 cents, whereas the rates from Southeastern Missouri to St. Louis and Memphis were increased by an average of only 0.8 cents (R. 258, 259).

ments corrected, etc. can be of no possible aid to the Court in determining whether, in making a general reduction in the rates, which the report shows the Commission itself regarded as one of the issues, if not the major issue, the Commission proceeded upon an erroneous conception of its powers and duties.

The argument of all the appellees is that the Commission could not have done so because of the declaration which the report contains that it was proceeding under the Interstate Commerce Act:

> "The Supreme Court of the United States recently interpreted the Hoch-Smith resolution as setting up no standard of reasonableness of rate level or relation other than that already provided by the interstate commerce act, *Ann Arbor Railroad Company* v. *United States*, ... U. S. ..., decided June 2, 1930. The findings herein are under the provisions of the interstate commerce act" (R. 111).

The brief of the Commission itself states:

> "Appellants, as we conceive it, have interpreted the court's decision [in the *Ann Arbor* case] correctly. The Commission's sole function is the administering of the Interstate Commerce Act and related Acts as interpreted by this Court when such interpretations have been made. Because of its prior misconception of the law, the Commission in this case gave express notice that it was following the teaching of the court in the then recently announced decision in the *Deciduous Fruit* case" (Brief, p. 65).

The declaration relied on was, of course, inserted in the report after the decision in the *Ann Arbor* case. What

other changes, if any, were made either in the report or the order does not appear.

In the foregoing excerpt from the Commission's brief, it naïvely suggests that because, in such declaration, the Commission gave express notice to this Court, among others, that it was following its teaching in the *Ann Arbor* case, it must have properly interpreted the same and could have committed no error. Judicial review may not be avoided by any such "express notice" to the Court or by any such self-serving declaration.

The Commission in its brief also says:

> "* * * The need for the statement by the Commission that it was following the teaching of the court arose from the very fact that it had theretofore given to the resolution an interpretation different from that of the court" (p. 32).

This is equivalent to saying that but for this statement the Court would be justified in holding that the order was based upon a misinterpretation of the resolution and of its effect upon the powers and duties of the Commission. If for this reason there was "need" of such statement, it would seem that there was equal "need" for a statement of what the Commission's then conception of the effect of the resolution upon its powers and duties was. Obviously, a mere statement that the Commission's findings were made under the Interstate Commerce Act was not in itself sufficient to obviate a conclusion, which, counsel in effect says might otherwise have been drawn from the report, *viz.*: that they were based upon a misconception of its powers and duties thereunder.

Moreover, Commissioner Eastman in his concurring opinion, although stating that the Commission was proceeding under the Interstate Commerce Act, in that the Act empowered it to establish the lowest possible lawful rates on any description of traffic, also stated that the resolution made it its duty to do so in this case. This interpretation was the interpretation originally placed upon the resolution by the Commission itself in *Grain and Grain Products*, 122 I. C. C. 235, but departed from in the order set aside in the *Ann Arbor* case, in that the Commission there used standards other than those of the Interstate Commerce Act in determining what the lowest possible lawful rates were.

If, therefore, as the Commission's brief says, there was "need" for the statement which the report contained, that need would appear to extend to a repudiation of the interpretation originally placed upon the resolution by the Commission and restated by Commissioner Eastman in his concurring opinion. This "need" would seem to have been all the greater since, as will appear from the review to be hereinafter made of the other concurring opinions, all of the eight Commissioners filing concurring opinions, constituting more than a majority of the Commission, appear to have been possessed of the same or a substantially similar conception of the effect of the resolution upon the duties, if not the powers, of the Commission.

Indeed, when the statement relied upon is read in the light of these opinions, it is evident that the "need" was never satisfied.

It is also significant that the Commission nowhere in its brief states what its present conception of its

powers and duties under the third paragraph of the resolution is, and nowhere states that the view expressed by Commissioner Eastman, and as we believe, implicit in all the concurring opinions, is erroneous, or other than its own. On the contrary, it says (Commission's Brief, p. 20) that we have given "a strained implication" to the language of the concurring Commissioners. On page 33 of its brief the Commission says:

> "Moreover the lower court was unable to conclude that any words in said separate opinions had reference to other than lawful rates as defined in the *Deciduous Fruit Case.*"

With this conclusion of the Court below the Commission apparently concurs, although it does not say so specifically. The interpretation which we have placed upon the language contained in the concurring opinions is not a strained interpretation. It is based upon their express and unequivocal language. If by this reference to the conclusion of the Court below the Commission means to say that there is nothing in those opinions, and particularly that of Commissioner Eastman, which is in conflict with the law, then it means to say that, as stated by the Commissioner, the resolution made it the duty of the Commission to establish on agricultural products affected by depression the lowest possible lawful rates compatible with the maintenance of an adequate transportation system. If so, then the Commission was not exercising its independent judgment, but proceeding because of a duty supposed to be imposed upon it by the resolution. The resolution may have imposed such a duty. We do not think it did. If it did not, then, despite the decision

of the court below, the language employed in the concurring opinions was in conflict with the law and with the decision of this Court in the *Ann Arbor* case. Unless, by thus directing attention to the opinion of the Court below, the Commission meant to assert that there was no conflict, there was no occasion to have referred to it.

The failure of the Commission in its brief, as well as in its report, to repudiate or qualify the statements contained in the concurring opinions, including that of Mr. Eastman is, we think, highly significant. Equally significant is the failure of the Commission to state plainly in its brief what it now conceives to be the effect of the resolution (since the decision in the *Ann Arbor* case), upon its duties, if not upon its powers. Instead of so doing the Commission apparently prefers to rely upon the "express notice" given to this Court, that it followed its teachings, without enlightening the Court as to what it conceives such teachings to have been. It thus would preclude judicial review of its action by an ambiguous self-serving declaration contained in its report, accompanied by complete silence even now as to what it meant.

3. It appears from the separate opinions of concurring Commissioners constituting a majority of the Commission, that the action of the Commission was taken in response to a supposed duty to attempt to relieve the condition of agriculture by reduction in rates, irrespective of the requirements of Sec. 15a, provided only the Commission was of the opinion that such reductions would not spell immediate disaster to the carriers.

It is also significant that while other briefs argue that Commissioner Eastman was expressing his own

views only, the brief of the Commission does not. Apparently, although the Commission was without sufficient courage to adopt and defend Mr. Eastman's interpretation, it also felt itself precluded from repudiating it, obviously, as we think, because it represented the Commission's own conception of its powers and duties.

We shall not repeat the facts and considerations set forth in our opening brief, from which we think it appears that Commissioner Eastman's opinion is not only not inconsistent with the main report but that it is the only conception of power and duty consistent therewith.

But certain it is that it did not represent his views alone. On the contrary, the remaining concurring opinions show that his was likewise the conception of their authors, constituting in themselves a majority of the Commission.

Commissioner Woodlock, after referring to "the extremely low level of the rates here prescribed" (R. 186), concludes that that level is in fact too low:

> "My main difficulty with the report is the level of the rates prescribed. They are, in my judgment, far too low. They will involve a reduction of at least $15,000,000 in the revenues of carriers in the western district—perhaps more * * * If the rates herein prescribed are to remain long in effect in this territory, I can not but feel that they will produce a situation which will require emergency remedies if we are to maintain in that territory 'an adequate system of transportation'" (R. 187).

Commissioner Lewis refers to the "cuts of 20, 30, 40, 50, or even 60 per cent. in the present rates," and states that in his judgment "some of the carriers are not at this time in a position to stand such reductions" (R. 182). Yet he votes with the other Commissioners, as did Commissioner Woodlock who thought the prescribed rates "far too low" and Commissioner Eastman who thought that "less severe" rates should have been prescribed. Why then did they vote for the reductions? It is evident that they were acting under a supposed duty to effect a reduction on agricultural rates in this proceeding, and that regardless of Section 15a, whose mandate might be obeyed in some later and different case. Thus, Commissioner Eastman said that:

> "Our duty under section 15a is to be performed in the exercise of our power 'to prescribe just and reasonable rates,' and those words in turn are to be read in the light of the Hoch-Smith resolution. Our *duty in this proceeding,* as I see it, is to prescribe rates on grain and grain products designed, on the evidence before us, to cover the cost of handling that traffic plus a substantial margin of profit, although not as large a margin as might be reasonable in the case of certain other forms of traffic. It will, however, *remain our duty* under Section 15a to see to it that the carriers have a general body of rates sufficient to produce, 'as nearly as may be,' the fair return stipulated by that section" (R. 172). (Italics ours.)

Commissioner Lewis's language is to a similar effect:

> "The best argument that is made in behalf of the decision herein is that it creates more equi-

table rate structure which will lend itself to horizontal adjustments up or down. This carries to me intimation that the level herein prescribed is probably too low to be permanent" (R. 186).

Commissioner Woodlock foresaw the same necessity of future action:

> "But for the other advantages of the report and but for one fact with respect to the new rate structure that structure would, in my opinion, constitute a fatal defect which would prevent me from even a partial concurrence in the report as a whole. But one advantage of the structure herein prescribed is that it will be susceptible of *horizontal change* without much risk of such change producing new and widespread discriminations so that its rectification when such rectification shall be shown to be *necessary* should not be a matter of great difficulty." (R. 187; italics ours.)

Commissioner Meyer, the Commissioner in charge of the case throughout, characterized the rates prescribed as the lowest rates which can be lawfully prescribed. This is only another way of saying that they were prescribed as the lowest possible lawful rates, by whatever standards such rates are to be measured.

> "The rates prescribed lie within the zone of reasonableness, but they are the lowest rates on this traffic which can be lawfully prescribed" (R. 150).

"We are establishing herein rates as low as we can lawfully prescribe" (R. 153).*

Here, therefore, are four Commissioners who obviously concurred in the order upon the theory that, despite the requirements of Sec. 15a, they were for some reason required to reduce the rates on agricultural products and establish the lowest possible rates thereon. Such a duty could only have arisen under the assumption that the resolution required it.

Commissioner Porter, although concurring in the report, complained that sufficient relief had not been accorded to the coarse grain farmer, as required by the resolution. Commissioner Porter was thus affected by his conception of what the resolution required the Commission to do. That he thought that, despite the decision in the *Ann Arbor* case, it made it the duty of the Commission to establish the lowest possible lawful rates on agricultural products affected by depression, is made perfectly plain by a subsequent dissenting opinion by the same Commissioner in another case (*Refined Petroleum Products in the Southwest,* 171 I. C. C. 381, 453), in which he said:

"Congress, in the Hoch-Smith resolution, has plainly directed that we should afford the products of agriculture the lowest possible lawful rates. True, the Supreme Court has recently held that

*The Commission suggests that this last statement of Commissioner Meyer is confined to export rates. We can only say that we do not believe that a fair reading of this statement taken in its entire context will support the construction given to it by counsel for the Commission.

that resolution did not 'purport to make any change in the existing law, but on the contrary requires that that law be given effect,' *Ann Arbor R. Co.* v. *United States*, 281 U. S. 658, but the direction of Congress still stands, and it is our duty faithfully to carry out the mandate, as near as may be, under the authority we do possess. This we have, in part, done recently within the very rate territory here involved, and in the *Grain Case*, 164 I. C. C. 619, have made reductions that will cost the carriers in southwestern territory several millions of dollars. * * *"

Commissioner Aitchison, although concurring, agreed with Commissioner Porter that the Commission had not made the rates on coarse grains low enough and, as he said, for the reasons stated in Commissioner Porter's opinion (R. 195). The reasons stated in Commissioner Porter's opinion was that the Commission had not performed its full duty under the resolution in respect of such rates:

"The utter disregard of the just claims of the coarse-grain farmers to relief by reduced freight rates, as compared with the substantial reduction in rates generally accorded the wheat farmer, is striking" (R. 191).

"The distressed condition of agriculture, quite fully described in an appendix to this report, unquestionably applies with as much force to the farmer who is producing coarse grains as to the farmer who is engaged in producing wheat exclusively. This proceeding is an outgrowth of the Hoch-Smith resolution, and surely Congress when it passed that resolution admonishing the commission to afford all possible relief to the farmer

meant the coarse-grain farmer just as much as it meant the wheat farmer" (R. 192).

Commissioner McManamy said that if a transit charge were added (which was not done), the rates could be reduced, and the revenues of the carriers protected, which he understood to be the object of the proceeding:

> "With a reasonable charge for this so-called free service it would be possible to give the actual grower of grain lower rates without depleting the carriers' revenues and that I understand to be the *primary object sought in this proceeding*" (R. 149; italics ours).

Seven out of eleven Commissioners, each of whom filed a separate concurring opinion, were thus obviously of the view that the Commission was required to attempt to relieve the condition of agriculture by a reduction in the rates on its products. No such duty is imposed by the Interstate Commerce Act. Any such view must have been based upon the supposed effect of the third paragraph of the resolution. On the other hand, it appears from the report that the carriers' rate of return was far below the statutory standard. It thus appears from these concurring opinions, whose authors constitute more than a majority of the Commission, that the Commission felt that its duty to attempt to relieve the condition of agriculture was so imperative that it was required to reduce the rates, notwithstanding the existing inadequacy of the carriers' rate of return, provided only it was of the opinion that such reductions would not spell immediate disaster to the carriers.

To these seven, we think, should be added Commissioner Brainerd, who said:

> "I favor * * a *lesser reduction* in the proportional rates and a *greater reduction* in the rates from country stations to the markets * * *". (R. 188; italics ours.)

He evidently recognized the duty to reduce; and the sole question in his mind was as to how the reductions should be apportioned. With Commissioner Brainerd added, all eight Commissioners filing concurring opinions are accounted for.

It is said in some of the answering briefs that Commissioner Eastman's views are to be taken to be his own only, but here we have seven other Commissioners filing concurring opinions, from which it appears that they likewise were proceeding upon the theory that it was the duty of the Commission to establish the lowest possible lawful rates on agricultural products affected by depression and by reason of that depression. Such a conception of a duty must have been based only upon the resolution. No Commissioner, whether filing a concurring opinion or joining in those of others, dissented from the views expressed by Mr. Eastman. They are, moreover, not only the views expressed by the Commission in its original interpretation of the resolution, but wholly consistent with the main report itself. Indeed, we believe that the review made of the report clearly demonstrates that it is the only rational view upon which the action can be sustained.

4. The Commission's misconception and disregard of Section 15a.

(a) NONE OF THE APPELLEES' BRIEFS DENY THAT THE CARRIERS' RATE OF RETURN WAS AND FOR MANY YEARS HAD BEEN BELOW THE STATUTORY STANDARD.

This is not denied in any of the briefs. In view of the facts recited in the report, and of the Commission's statement to Congress quoted in the bill (R. 12), that the carriers had never since the passage of the Transportation Act achieved the fair rate of return contemplated thereby, it is not capable of denial.

(b) WHETHER THE RATES PRESCRIBED WERE THE LOWEST POSSIBLE LAWFUL RATES OR NOT, IT APPEARS ON THE FACE OF THE REPORT AND INDEPENDENTLY OF THE CONCURRING OPINIONS OR OF ANY OTHER CONSIDERATION, THAT THE ORDER WAS BASED UPON A MISCONCEPTION OF THE POWERS AND DUTIES OF THE COMMISSION UNDER SEC. 15A.

In one respect the briefs in this Court differ from those presented by the appellees below. In that Court all the appellees, including the Commission, stoutly contended that the Commission was not required in this case to give any consideration to Sec. 15a whatsoever. So successful was their contention that they induced the District Court to adopt it (R. 703). That contention has now apparently been abandoned. At least it is not

renewed in any of the briefs and the Commission in its brief expressly states (p. 25) that consideration also had to be given to the provisions of Sec. 15a. In so doing the Commission was, of course, required to construe said section properly and to give proper effect thereto.

In our opening brief we said that if in its reference to Sec. 15a the Commission meant to construe it as permissive, it clearly misconstrued it. We also pointed out that when the Commission said that its order was fully responsive to all mandates of the law because, despite the substantial revenue effects of the order, it was satisfied that it would not threaten the maintenance of an adequate system of transportation, if it intended to say that the adequacy of carrier revenues under Sec. 15a was to be measured by merely determining whether they were so low as to threaten the maintenance of an adequate system of transportation instead of by the requirements of Sec. 15a as written, the Commission misconstrued both the plain language and the purpose of that section. We also said in effect, if not directly, that we did not believe that the Commission intended either construction, but that we believed that the Commission's disregard of Sec. 15a was based upon the theory that the Commission was discharged from a consideration thereof in this proceeding by reason of the resolution, although it might be required later on to give consideration thereto. The Commission does not like the explanation offered of its action. It says it could not possibly have placed such a construction upon the resolution.

But if such be not the explanation, then it conclusively appears from the report that the Commission,

whatever the reason, did misconstrue and misapply Sec. 15a.

If, as correctly stated in the Commission's brief, the Commission had to consider that section, it had to consider that section and its requirements as enacted by Congress. That it did consider the revenue effects of the order appears on the face of the report. The only provision of the Act which requires the Commission to consider the revenue effects of its action upon the carriers as a whole is Sec. 15a. Under that section the Commission is required to measure the sufficiency of such revenues and the resulting effect upon the maintenance of an adequate system of transportation by the relation of such revenues to a fair rate of return, to be determined by the Commission, and which the Commission had determined to be 5.75%. Instead of so measuring the revenue effects, the Commission measured them by a consideration of whether or not the reductions required would in its opinion threaten the maintenance of an adequate system of transportation.

The duty imposed by Sec. 15a is not merely to avoid making rates which constitute a threat to the maintenance of an adequate system of transportation, but to provide a structure which will produce, as nearly as may be, a fair return. The Commission thus failed to measure the revenue effects of the order by the standard of Sec. 15a, but measured them by a different standard wholly unwarranted thereby and inconsistent therewith. It could not have measured such revenue effects by the statutory standard, for if it had, it would have been bound to hold that the resulting revenue losses would reduce a rate of

return already inadequate under the standards of such section.

(c) THE RELATION OF THE ALLEGED PREVENTION OF WASTEFUL PRACTICES AND OF INCREASED REVENUES SUPPOSED TO RESULT FROM OTHER CASES TO THE COMMISSION'S MISINTERPRETATION OF SEC. 15A.

As we have stated, all the briefs stress the fact that some rates were advanced, that the transit rules were amended and the application of transit restricted and that certain wasteful practices with respect to the use of transit, such as out of line and back line hauls, were prohibited. From this is is argued inferentially, if not directly, that the Commission was concerned with and sought to protect the revenues of the carriers. But the net result, as appears from the report itself, was to reduce them. It was this net result that the Commission measured by the standard which it had substituted for that of Sec. 15a, and which, as we believe, was supposed to have its origin in the resolution. Assuming, without conceding, that by reason of these other provisions of the order the Commission might have reduced the rates somewhat, it clearly was without authority to reduce them to the extent that it did, and clearly without authority so to do if its action was based upon the substituted standard above described.

It is true that the resolution directed the Commission to review the entire rate structure for the purpose of bringing the same into harmony with all provisions of the Interstate Commerce Act. In so doing the Commission was required to give effect to Sec. 3, prohibiting the

removal of unjust discrimination. It was required to give effect to Sec. 1, subject to the limitations imposed thereon by Sec. 15a. It was equally required to give consideration to Sec. 15a. Any general rate proceeding which does not include the object of bringing the rate structure up to a point which will produce, as nearly as may be, a fair return upon the value of the property, is one which disregards one of the most fundamental provisions of the Act.

The carriers had never, since the passage of the Transportation Act, received that rate of return. If their failure so to do was because of certain wasteful practices uncovered in the general rate structure investigation, it was the duty of the Commission to require them to be stopped. The money saved would thus add to carrier revenues and increase the rate of return without increasing the rates. Certainly there was no duty on the part of the Commission under such circumstances to reduce the rates as well, and no power so to do through the establishment of lowest possible lawful rates, whether, as stated in the brief of the Commission, the new rates covered more or less service than before. If the object of the Commission in the general rate structure investigation of which this was a part, was to take away from the carriers through rate reductions everything saved through a correction of practices, then it was most certainly proceeding with such investigation under a wholly erroneous conception either of its duties under Sec. 15a or of the relation of Sec. 15a to such proceeding.

The same observations apply to the Commission's statement that its conclusion that the readjustment or-

dered will not threaten the maintenance of an adequate system of transportation is based in part upon increased revenues supposed to result from other cases. We say "supposed to result" because there was nothing of record indicating either the existence of such increases or their extent, and because the Commission, by denying the carriers' second petition for rehearing, refused to hear and consider any evidence whatsoever with relation thereto. Neither does the report of the Commission state the relation between such supposed increases and the losses resulting from this order. Assuming, contrary to the unchallenged allegation in the petition for rehearing (R. 533-534), repeated in the bill (R. 38), that they exactly offset each other, the fact still remains that the Commission was measuring the net result not by the standard of Sec. 15a but by considering whether, in its opinion, the maintenance of an adequate system of transportation would be threatened. In other words, the Commission by its own statement measured the adequacy of carrier revenues by a theory under which the Commission, instead of performing a duty to provide, as nearly as might be, a rate structure which would produce a fair rate of return, was privileged to establish any structure which it saw fit, provided only it was of the opinion that it did not spell immediate disaster to the carriers. That it felt so privileged is in itself the best evidence that the Commission believed that it was empowered to establish the lowest possible rates on the traffic involved. But whether such was its view or not, its order is shown upon the face of the report, without regard to any other considerations whatsoever, to have been predicated upon a

clear misconception of the requirements of Sec. 15a as applied to this case.

(d) THE COMMISSION DID NOT AND COULD NOT FIND THAT TRAFFIC WAS DIMINISHING UNDER THE EXISTING RATES OR THAT A REDUCTION IN THE GENERAL LEVEL OF RATES WOULD RESULT IN INCREASED TRAFFIC.

There is considerable discussion in appellees' briefs of the recent *Fifteen Per Cent case* (*Ex Parte 103*), 178 I. C. C. 539, and in particular of the position taken by the Commission in that case that its function in applying Section 15a was not that of a mere mathematical computor, but required it to have in mind *the actual revenue result* of its action. That is to say, the Commission could deny a general rate increase, notwithstanding existing inadequacy of return, if it found as a fact in the exercise of its judgment that such increase in rates would result in a decrease of traffic of such proportions as to bring about an actual decrease, rather than increase, of revenues.

Appellants are not here to dispute the soundness of this position. In this case, the Commission did *not* do what it did in the *Fifteen Per Cent case*. It did *not* find in this case (either formally or informally) that the reduction in the general level of rates which it was imposing would result in greater traffic and greater revenues. Nor did it find that traffic and revenues had fallen off under the existing rates.

When the carriers alleged and offered to prove in their petition for rehearing that grain was continuing to move

in unreduced volume and would continue so to do (R. 528), the Commission declined to take any proof on this question. In support of their allegation the carriers set forth in their petition for rehearing the authentic statistics of the American Railroad Association. The Commission had no reason to doubt their accuracy. In denying the petition the Commission thus foreclosed any possible argument that the reductions were designed to prevent a diminution of traffic.

(e) THE COMMISSION'S ARGUMENT THAT IT PERFORMED ITS DUTY UNDER SECTION 15A IN THE EARLIER GRAIN CASES, ITSELF POINTS THE CONTRAST WITH THE PRESENT CASE, IN WHICH THE COMMISSION DISREGARDED THAT DUTY.

The Commission's counsel later take the position that the Commission has in fact performed its duty under Section 15a in other cases (Brief, p. 72). For this, they refer to *Increased Rates, 1920,* and *Reduced Rates, 1922,* considered above, and to the two earlier Western Grain cases, the reports in which are contained in the record (*Public Utilities Commission of Kansas* v. *A. T. & S. F. Ry. Co.*, R. 327-339; *Rates and Charges on Grain and Grain Products,* R. 341-420). This is precisely our point: The Commission still acted with due regard to Section 15a in those two Grain cases. But that very fact points the contrast with its improper action in this case. In the *Kansas Public Utilities* case and in *Rates and Charges on Grain and Grain Products,* the Commission denied requested reductions in the general level of grain

rates in the Western Group, upon the finding, among others, that the carriers had not earned and were not earning a fair return (R. 13, 15).

It is the utter lack of any contrary findings in the present case, which (taken with all the other circumstances in the case) show that the Commission was here acting under a misconstruction of its power and duties, in striking contrast with the correct construction of its powers and duties evidenced in the prior cases.

(f) THE COMMISSION'S MISCONSTRUCTION OF SECTION 15A IS CONCLUSIVELY ESTABLISHED BY ITS ACTION IN REGARD TO THE CARRIERS' PETITIONS FOR REHEARING.

The misconstruction of Section 15a is finally and conclusively established by the Commission's attitude on the Petitions for Rehearing. The Commission's answer to our argument on this point is wide of the mark. Its counsel state that (Brief, p. 82):

> "Unquestionably, reopening [of the proceedings] would have meant further lengthy proceedings, since the very condition of *diminishing traffic* would have been used in evidence and argument against a higher level of rate." (Italics ours.)

But the key fact on this head of the case is that the carriers showed to the Commission and offered to prove that, notwithstanding the depression, the grain traffic had *not* diminished (R. 528), and in fact, that this was the only major description of traffic which had not diminished. The Commission's argument is based upon the assumption of diminishing traffic. The assumption is

false, and the argument accordingly turns against its maker.

It is assumed throughout the briefs for appellees that the Commission would be justified in reducing the grain rates, notwithstanding that the carriers were not earning a fair return, provided only that the Commission believed that the maintenance of the existing rates would diminish traffic. In this case, the carriers actually showed the Commission that the existing rates had not diminished traffic, notwithstanding the existence of a nation-wide depression and an accompanying diminution in all other classes of traffic.

We are at a loss to see any other possible construction that can be placed upon this action of the Commission other than that

> (*a*) either the Commission believed that it must give effect to a supposed mandate of the Hoch-Smith Resolution to reduce rates notwithstanding Section 15a,
>
> (*b*) or the Commission acted in a high-handed and arbitrary manner, having regard, in the language of Mr. Chief Justice White in the *Illinois Central* case (215 U. S. 452, 470), to the shadow and not the substance. The shadow upon which the Commission relies to protect it in this case is its ultimate finding that the existing rates were unreasonable under the provisions of the Interstate Commerce Act. On this record, the substance behind the shadow is evident: That the Commission was acting under a supposed duty to

make the grain rates the lowest rates that it could lawfully prescribe, and accordingly to reduce the general level of the grain rates below a level on which the traffic was already moving freely.

(g) THE COMMISSION'S BRIEF, IN GIVING AN EXPLANATION FOR THE MISCONSTRUCTION OF SECTION 15A, AGAIN CONFIRMS THAT SUCH MISCONSTRUCTION EXISTED.

The Commission's own brief in this Court in effect admits that the Commission misconstrued and did not attempt to apply Section 15a to this case. At page 67 of their brief, the Commission's attorneys give the *explanation* why the Commission construed Section 15a as a mere permission to the carriers to earn a fair return. This construction, we are told, was the result of the Commission's experience in the case of *Increased Rates, 1920*, 58 I. C. C. 220. In other words, the Commission did not construe the act upon the basis of the language and intent of Congress, but construed the act upon the basis of its own experience in its application.

The Commission does not deny that its construction of the statute as a mere permission failed to give full effect to the language and intent of Congress; instead it explains why it adopted that construction. In effect, the Commission says that it gave Section 15a one trial in 1920, and that the results of that trial being unsatisfactory it determined thereafter to construe the Section as a mere permission. In any even the explanation is

irrelevant;* the misinterpretation alone is enough to condemn the decision which was based upon it. Having explained why the Commission lost faith in Section 15a, as written, and concluded to construe it as a mere permission, the Commission's counsel developed a theory upon which to support that construction. Their theory is that because the Commission's duties under Section 15a are to be performed in the exercise of its power to prescribe just and reasonable rates (Brief, p. 71), the mere finding that the prescribed rates are just and reasonable disposes of Section 15a along with Sections 1 and 15(1). This simply amounts to shelving Section

*If it were important to consider whether the Commission's explanation of its misinterpretation of law is based upon adequate experience in practice to show that the law was in fact unwise, we think that this record would itself show that the Commission has never given Section 15a an adequate trial, and that it abandoned that section too early. Its counsel tells us that it based this construction of the section upon its experience of 1920 and 1921. Traffic then fell. It is common knowledge that that was a period of depression. Traffic having fallen during that period of depression, the Commission in 1922 held a further proceeding and cut the increases in rates that it had granted in 1920. Since then, it has never given effect to Section 15a in any proceeding dealing with the general level of rates. This is not surprising, as its counsel tell us that it reached the conclusion that such attempt would be ineffective. But it is evident that the time at which such an attempt might have been successful would have been a time of prosperity, *i.e.* a time during which traffic would presumably be free to move notwithstanding increased rates. Broadly speaking a period of national prosperity was enjoyed between the years from 1924 to 1929; yet, during those years the carriers' revenues never provided them with a fair return (R. 77 516-518). There is, of course, no issue here as to whether the Commission should have so raised the rates in the Western District during this period as to provide the carriers with a fair return. We merely point out that this would have been an opportunity for the Commission to have given Section 15a a trial during a period presumptively favorable to the success of the trial.

15a in favor of the pre-existing standard of "just and reasonable" rates. It amounts to saying that the Commission will never be required to account for its stewardship of Section 15a, because whenever the question is raised, it can make the simple answer, "We have found the just and reasonable, non-discriminatory rates".

To sustain the Commission's position in this case, is in effect to write Section 15a out of the act.

(h) THE ARGUMENT IN THE COMMISSION'S BRIEF THAT THE ULTIMATE FINDING IS SUFFICIENT BECAUSE THE COMMISSION'S DUTIES UNDER SECTION 15A ARE TO BE PERFORMED IN THE EXERCISE OF ITS POWER TO FIX JUST AND REASONABLE RATES, IS BASED ON A MISCONSTRUCTION OF SECTION 15A, WHICH PROVIDES THAT THE COMMISSION SHALL SO ADJUST THE JUST AND REASONABLE RATES THEMSELVES AS TO PROVIDE THE NECESSARY FAIR RETURN.

The rates prescribed were characterized by the Commissioner in charge of the case as the lowest rates which could be lawfully prescribed. That such was the purpose of the Commission appears from the foregoing review of the eight concurring opinions. It is further substantiated by consideration of the extent and severity of the reductions ordered. That the rates were properly so characterized is not denied by the Commission in its brief. In our opening brief we urged that the Commission was without authority to establish the lowest possible lawful rates at a time when the carriers' rate of return was inadequate and thus to deprive the carriers

pro tanto of the opportunity to earn a fair rate of return under rates which, although higher, would fall within the flexible limits of the Commission's discretion and within the zone of reasonableness.

In order to meet this argument the Commission in its brief repudiates the zone of reasonableness and flexible limits theory entirely and makes the assertion that "when the Commission reaches its determination as to what is the reasonable rate", after considering all factors which it is privileged to consider, "that and none other is the reasonable rate" (Commission's Brief, p. 65). In other words, in order to meet the arguments made, the Commission now takes the view that there is but one absolute rate which meets the standards of Sections 1 and 15, and that that rate is the rate which the Commission fixes and that there may be no other rate which would meet such standard. This is an entire repudiation of the flexible limits and the zone of reasonableness theory previously put forward by the Commission. It is directly contrary to the provisions of Sec. 15 (1) itself, which permits the Commission to fix either a maximum rate, an absolute rate or a minimum rate. It is directly contrary to the decision of this Court in *American Express Company* v. *Caldwell,* 244 U. S. 617, 624 in which the Court accepted the Commission's zone of reasonableness theory and said that there might at the same time be more than one rate within such zone and hence reasonable, by reason whereof an order for the removal of undue discrimination might be made either by an advance in the one or a reduction in the other. In *Grain and Grain Products,* 122 I. C. C. 235, the Commission had

recognized the existence of a lowest possible lawful rate defined by it as being the lowest rate falling within the limits of its flexible discretion.

There is nothing in the report which indicates that the Commission had at the time the report was made changed its mind.* If so, it would clearly have erred by reason of the fact that there is obviously such a zone of reasonableness and there are obviously such flexible limits to the Commission's discretion. As pointed out in our opening brief, the purpose of Sec. 15a was to require the Commission to exercise such discretion so far as necessary to bring about out of all rates made thereunder a fair rate of return as nearly as might be. That such was its purpose would appear to be self-evident.

In order to avoid the consequences of this argument, the Commission is thus required to take the extreme position that there is never but one rate which, if made, would meet the standards of Sec. 1, and that that is the rate which the Commission fixes. We have never contended that the Commission may not reduce a rate clearly unreasonable under the standards of Sec. 1 because not within the zone of reasonableness, irrespective of the carriers' rate of return. We have said that in determining this question and also in fixing the rate for the future, the Commission must have regard to the requirements of Sec. 15a and exercise its discretion so as to carry out, as nearly as may be, the purposes of that

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*On the contrary Commissioner Meyer, who had had charge of the case, expressly recognized the zone of reasonableness by saying that "The rates prescribed lie within the zone of reasonableness but they are the lowest rates on this traffic which can be lawfully prescribed" (R. 150).

section. The Commission now says that no such duty rests upon it, not because it would not if the zone of reasonableness theory were applied, but because there is no such thing as a zone of reasonableness to be considered.

And the very language of Section 15a defeats the theory that there is no zone of reasonableness. That language is that the Commission SHALL, in the exercise of its power to prescribe just and reasonable rates, so initiate, modify, establish or adjust SUCH rates (i.e. just and reasonable rates) as to provide the fair return. But if there is only one possible just and reasonable rate, how can it be adjusted? How indeed can it be modified?

It is hard to conceive of clearer language in a statute. It instructs as to the duty: to provide the carriers as nearly as may be with the rate of return to be determined by the Commission as fair for such purpose (now 5.75%). It instructs as to the time when the duty is to be performed: *in* the exercise of the power to fix rates, i.e. in cases just like the present. It instructs as to the method: By taking rates (either previously unjust or unreasonable *or previously just and reasonable*) and so modifying and adjusting THEM as to provide the fair return. Finally, it instructs as to the seriousness of the duty: The Commission SHALL obey it.

The Commission has not obeyed it in this case. It has sought to construe it away,—as a mere permission, as a mere incident of the duty under Section 15(1), as satisfied if the maintenance of an adequate system of transportation is not actually threatened. All are inadequate to mitigate the Congressional mandate or to justify its being ignored.

5. Appellees have completely failed to meet the point that the Commission erred in considering decisions of other cases which were not in the record.

Appellants' point that the Commission erred in taking into consideration factors outside the record was not made frivolously or as a mere make-weight. Under the decisions of this Court referred to in our main brief (*Interstate Commerce Commission* v. *Louisville & Nashville Railway Co.*, 227 U. S. 88, 93; *U. S.* v. *Abilene & Southern Ry. Co.*, 265 U. S. 274, 289), an administrative commission can act only upon the record before it. Otherwise, of course, the constitutional requirement of a notice and a hearing would be rendered nugatory. Even if we assume that in this case the influence of the particular matters considered outside the record may have been disproportionately small to the magnitude of the issues involved, we cannot believe that such a consideration would constitute a defense for the Commission's action. A disregard of constitutional rights may not be defended upon the ground of the slightness of the offense.

Yet in this case, it is by no means clear that the material which was considered off the record may not have been of compelling importance. The language of the Commission at the conclusion of its report was that

> "It follows that the revenue effects of the increases and decreases which will follow the effectiveness of our action herein can not be precisely stated. We have made many different *checks and estimates*. While the reductions far exceed the increases, and the corresponding revenue effects will be substantial, the full effect upon revenues

> can not be adequately foretold, in view of the limitations upon transit, the elimination of transit balances outbound from primary markets, and the greater safeguarding of revenues from wasteful competition that should follow the reduced level of rates. We are satisfied that the readjustment will not threaten the maintenance of an adequate system of transportation. We say this *especially* in the light of increased revenues already granted in certain other cases, and in the realization that a failure of the present revision to afford adequate revenues will prompt further proceedings" (R. 147-148; italics ours).

The Commission here stated that it based its conclusion upon at least two considerations not within the record:

> (a) Increased revenues already granted in certain other cases; and
>
> (b) Many different checks and estimates of the revenue effects of its order.

(a) THE COMMISSION ACTED "ESPECIALLY" IN THE LIGHT OF INCREASED REVENUES PRESUMED TO HAVE BEEN GRANTED IN CERTAIN OTHER CASES, NEITHER THE REPORTS NOR THE ORDERS IN WHICH CASES WERE IN THE RECORD.

The Commission made its determination on the vital point as to whether the reduction in the rate level would threaten the maintenance of an adequate system of transportation, "in the light of increased revenues granted in certain other cases." To this, the Commission's answer in its brief is that it "did not divorce its mind of the fact

that those increases had been made" (Brief, p. 80). But the injustice to the carriers did not arise from the mere human fact that the Commission did not divorce its mind from these considerations, but from the fact that it affirmatively relied upon them in reaching its determination upon the question as to whether an adequate transportation service would be maintained. Surely, it is as much the Commission's duty to confine the grounds of its decision to facts of record in cases dealing with the maintenance of the adequacy of transportation service, as in any other type of case.

As pointed out in our main brief (pp. 151-152), this was evidently a reference to the *Class Rate case*, another part of the *Rate Structure Investigation*,—a case which was decided May 6, 1930, ten months after this case was submitted and over eighteen months after the close of the record. Obviously, the carriers had no chance to consider or cross-examine any evidence as to the decision in that case or its effect on their revenues. Whether or not the Commission is right in its assumption that the revenues would be increased, is entirely irrelevant. The vice lies in the fact that the Commission's conclusion that the reduction in the general rate level ordered in this case would not "threaten the maintenance of an adequate system of transportation" was based on a consideration of the presumed revenue increases resulting from the *Class Rate case*, a case which could not possibly have been in the record.

Indeed, it appears in the record that the carriers were prepared to prove, and actually offered to the Commission in a petition for rehearing to prove, that the expectation

of revenue increases from the *Class Rate* case was exaggerated, if not unfounded (R. 534).

Moreover, it appears of record before this Court that no other cases were in the record before the Commission. This appears in the affidavits of A. B. Enoch and R. S. Outlaw, both attorneys who attended the proceedings throughout before the Commission (R. 655, 656). The statements in these affidavits that "the said record does not show or contain any evidence of increased revenues granted in certain other cases nor does it show that the revenues had been increased in certain other cases" and "that no evidence of increased revenues granted in other cases was incorporated in said record," are not controverted, and no counter affidavits were filed.

(b) THE CONSIDERATION BY THE COMMISSION OF MANY DIFFERENT CHECKS AND ESTIMATES OF THE REVENUE EFFECTS OF ITS ORDER.

It is evident that these checks and estimates could not have been of record, as the effect of the order could not have been known before the order itself was determined upon. The very *basis* of the checks and estimates, that is, the factor which is checked and the effect of which was estimated, was not itself in the record. The Commission was not merely basing its order upon data not submitted to the carriers for cross-examination, but was basing that data upon other facts (the increases and decreases actually ordered) which were, in turn, necessarily not known to the carriers or subject to their cross-examination.

The Commission's brief is in error in stating that "the checks and estimates referred to by the Commission were, of course, in respect of matter put into the record as to which appellants had had their opportunity of cross-examination and rebuttal" (Brief, pp. 79-80). The checks and estimates were of the revenue effects of *the order itself,* which could not have been determined—even approximately—prior to its rendition, particularly if—as we are told must have been the case—it was revised after the decision of the *Ann Arbor* case.

6. Appellees failed to meet the point that the Commission's decision was arbitrary in that it was based upon the realization that a failure of the present revision to afford adequate revenues would prompt further proceedings.

This point is not met in any of the briefs for the appellees. It also was not advanced frivolously or as a mere make-weight.

The very argument advanced by the appellees to support the action taken, places the Commission squarely on the horns of a dilemma. On the one hand, the Commission is defended for making its determination "in the realization that a failure of the present revision to afford adequate revenues will prompt further proceedings," on the ground that it was impossible for it accurately to forecast what would result, and that, therefore, situations requiring further consideration might be brought to its attention (Commission's Brief, p. 78). On the other hand, the offers of the carriers to bring to the Commis-

sion's attention the serious decrease in revenues, and to prove that increased revenues had not in fact been granted in certain other cases, were denied by the Commission out of hand; and the Commission's brief justifies the denial by the argument that the Commission necessarily projects into the future the results of a decision based on the conditions disclosed in the record (Commission's Brief, p. 82).

Where then are the railroads to seek relief? Where is the country to find its safeguard of an adequate system of transportation? When the carriers offer evidence that a proposed reduction in rates will threaten the maintenance of an adequate system of transportation, the Commission tells the carriers to give the reduction a trial and reassures them by a statement that it, itself, realizes that a failure of the revision to afford adequate revenues will prompt further proceedings by the carriers. When, for two full years after the close of the Record, the revenues fall off seriously notwithstanding that the new reduction has not yet gone into effect, the carriers, acting in conformity with the anticipation of the Commission, come to the Commission for relief instead of going to Court, and show to the Commission that (1) their revenues are declining in an alarming degree, (2) their traffic (other than the specific class of traffic herein involved) is also declining in an alarming degree, and (3) that the increased revenues which the Commission suggested might be realized from certain other cases (but in respect of which the Commission had not given the carriers a hearing) would not in fact be realized, what does the

Commission do? It denies the petition for rehearing in 13 days.

In this case, the carriers were literally *forced* to appeal to the Courts.

Respectfully submitted,

WALTER MCFARLAND,
ELMER A. SMITH,
P. F. GAULT,
DOUGLAS F. SMITH,
H. H. LARIMORE,
J. N. DAVIS,
A. B. MASON,
R. J. HAGMAN,
M. L. COUNTRYMAN, JR.,
R. S. OUTLAW,
LESLIE CRAVEN,
A. B. ENOCH,
D. P. CONNELL,
DICK DIXON,
FRANK A. LEFFINGWELL,
Attorneys for Appellants.

FREDERICK H. WOOD,
WILLIAM D. WHITNEY,
G. HOWLAND CHASE,
Of Counsel.

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